

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF INSURANCE, FINANCIAL)
INSTITUTIONS AND PROFESSIONAL)
REGISTRATION,)

Petitioner,)

vs.)

DONALD E. CHRISTIAN,)

Respondent.)

No. 06-1603 DI

061109327C

DECISION ON REMAND

The Director of Insurance, Financial Institutions and Professional Registration ("the Director") has established cause to discipline the bail bond agent license of Donald E. Christian pursuant to § 374.755.1(2), RSMo Supp. 2005.

Procedure

The Director filed a complaint alleging that Donald E. Christian was a licensed bail bond agent. The Director alleged that "§ 374.755.1(2), RSMo (Cum. Supp. 2005)" provided cause to discipline Christian because, on October 20, 1998, Christian pled guilty to and was adjudicated guilty of the Class C felony of possession of a controlled substance in Missouri. The statute cited allows discipline of a licensee who has a:

[f]inal adjudication or a plea of guilty or nolo contendere within
the past fifteen years in a criminal prosecution under any state or

federal law for a felony or a crime involving moral turpitude whether or not a sentence is imposed, prior to issuance of license date[.]

We held a hearing.¹ On May 22, 2007, we issued a final decision as follows:

We find no cause to discipline Christian because the law upon which the Director relies, the present version of § 374.755.1(2), did not exist when Christian pled guilty and was convicted.

In our Conclusions of Law, we stated that 1 CSR 15-3.350(2)(A)4 requires the Director's complaint to set forth "[a]ny provision of law that allows discipline for such facts." The Director cited the current version of § 374.755 which did not become effective until January 1, 2005.² Relying on Section 1.170³ and *Comerio v. Beatrice Foods Co.*, 595 F. Supp. 918, 920-21 (E.D. Mo. 1984), we concluded:

Unfortunately, the current version of § 374.755 did not become law until January 1, 2005, well after Christian's 1998 guilty plea and conviction. We have no authority to discipline a licensee on the basis of a version of the disciplinary statute that did not exist at the time that the factual basis (the guilty plea and conviction) for a proposed disciplinary action occurred. We can use only the disciplinary statute that was in effect when Christian pled guilty. The version of § 374.755.1(2) in effect at the time of Christian's 1998 guilty plea allowed discipline for a licensee "[h]aving entered a plea of guilty or having been found guilty of a felony[.]" However, we cannot use that version because the Director did not rely on it in his complaint. Therefore, we can find no cause to discipline Christian.

(Footnotes omitted.)

On June 1, 2007, the Director filed a motion for rehearing and leave to amend complaint. The amended complaint substituted the version of § 374.755.1(2) that was effective in 1998 for the amended version, effective January 1, 2005. We granted the motion on June 11, 2007, and stated that we would schedule a hearing. Also, on June 11, 2007, the Director filed a

¹ Although notified of the time, date, and place of the hearing, Christian did not appear.

² Laws 2004, SB 1122, § B, at p. 1188 (92d Gen. Assem., 2d Reg. Sess.).

³ RSMo 2000.

“withdrawal” of the motion for rehearing and leave to amend complaint. On June 14, 2007, we noted the filing of the withdrawal and reinstated our decision issued on May 22, 2007.

On June 15, 2007, the Director filed a petition for review in the Circuit Court of Cole County (“the Court”).⁴ On November 7, 2007, the court issued Findings of Fact and Conclusions of Law reversing our decision (“the Judgment”). The court ordered that our decision be reversed and remanded to us “to issue Findings of Fact, Conclusions of Law, and Decision consistent with this Judgment.”

We received a copy of the Judgment on December 31, 2007. We received the Director's “Motion to Issue Findings of Fact, Conclusions of Law, and Decision Consistent with Court Judgment” on January 10, 2008. The Director has asked us to issue a decision, findings of fact, and conclusions of law that are identical to those in the Judgment. We cannot do that *in toto* because portions of the Judgment relate to the court’s recitation of its jurisdiction over the petition for review. Accordingly, we have chosen those findings of fact and conclusions of law from the Judgment that support the decision that the court ordered us to make.

As ordered, we enter these findings of fact and conclusions of law that are consistent with the Judgment:

Findings of Fact

1. On October 20, 1998, Christian pled guilty to the felony of possession of a controlled substance (Cocaine, Schedule II) in the Circuit Court of Montgomery County. On the same day, the court sentenced Christian to three years’ imprisonment and remanded him to the sheriff for delivery to the reception center of the Department of Corrections.

⁴*Director of Insurance v. Christian*, No. 07AC-CC00528.

2. The Director issued a bail bond agent license to Christian on March 17, 2005, with an expiration date of December 31, 2007.⁵

Conclusions of Law

We have jurisdiction over the complaint.⁶ The Director has the burden of proving facts for which the law allows discipline.⁷

We set forth verbatim the following conclusions of law from the Judgment:

10. Missouri courts have interpreted § 1.170, RSMo (2000), to apply to acts done or rights established in a proceeding prior to the repeal of a given statute, but retrospective application of statutes does not run afoul of Section 1.170 if such use is procedural and does not impair any substantive rights vested by a prior statute. See Darrah v. Foster, 355 S.W.2d 24, 29 (Mo. 1962); Research Medical Center v. Peters, 631 S.W.2d 938, 941 (Mo. App. W.D. 1982); and City of Kahoka v. Webber, 618 S.W.2d 267, 269 (Mo. App. ED. 1981).

11. Comerio v. Beatrice Foods Co., 595 F. Supp. 918, 920-21 (ED. Mo. 1984) . . . can be distinguished on the grounds that to the extent the case referred to § 1.170, it was in reference to 'acts done' pursuant to rights vested in a recently repealed statute that regulated service letters issued by corporations. Nothing contained in the court's opinion involves the application of § 1.170 to licensing practices by an agency.

12. . . . Article 1, Sec. 13 of the Missouri Constitution, provides that no *ex post facto* law or law retrospective in its operation shall be enacted. However, Missouri courts have recognized, similar to their interpretation of § 1.170, two exceptions to this constitutional provision: (1) where the legislature manifests a clear intent that it do so, and (2) where the statute is procedural, dealing only with procedure and remedies, and does not affect any substantive right of the parties. See Darrah, 355 S.W.2d at 30; and State ex rel. St. Louis-San Francisco Railway Co. v. Buder, 515 S.W.2d 409, 410 (Mo. banc 1974).

13. A statute is substantive if it defines the rights and duties giving rise to the cause of action. Brennecka v. Dir. of Revenue, 855 S.W.2d 509, 511 (Mo. App. W.D. 1993). It is

⁵The Director has not advised us whether Christian applied for renewal or allowed the license to expire.

⁶Section 621.045, RSMo Supp. 2007.

⁷Missouri Real Estate Comm'n v. Berger, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

procedural if it prescribes the method of enforcing rights and carrying on the suit. Id. Substantive statutes take away or impair vested rights acquired under existing law, or create a new obligation or impose a new duty. Id. The Missouri Supreme Court has noted that a law is not retrospective in operation, within the terms of the constitution, unless it impairs some vested right. Fisher v. Reorganized School District No. R-V, 567 S.W.2d 647, 649 (Mo. banc 1978).

14. A “vested right” means a title, legal or equitable, to the present or future enjoyment of property or to the present or future enjoyment of a demand, or a legal exemption from a demand made by another. Id. “Vested” means fixed, accrued, settled or absolute. Robbins v. Robbins, 463 S.W.2d 876, 879 (Mo. 1971). No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his or her rights. Fischer at 137. There is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. Backus v. Fort St. Union Depot Co., 169 U.S. 557, 570 (1898). In general, the legislature may pass retrospective laws that in their operation may affect pending suits or modify an existing remedy. Darrah v. Foster, 355 S.W.2d 24, 29 (Mo. 1962). A statute which does not take away or impair a ‘vested right’ or impose a new or greater duty is not unconstitutionally retrospective merely because it relates to prior facts or transactions. See Hoskins v. Box, 54 S.W.3d 736, 739 (Mo. App. W.D. 2001); Bd. of Registration for the Healing Arts v. Boston, 72 S.W.3d 260, 265 (Mo. App. W.D. 2002). In addition, a statute dealing only with procedure or the remedy applies to all actions falling within its terms whether commenced before or after the enactment unless a contrary intention is expressed. Id.

15. Statutes authorizing state agencies to regulate and discipline licensed professionals are remedial statutes enacted in the interest of the public health and welfare and must be construed with a view to suppression of wrongs and mischiefs undertaken to be remedied. See Bhuket v. State ex rel. Missouri State Bd. of Registration for the Healing Arts, 787 S.W.2d 882, 885 (Mo. App. W.D. 1990) and Bittiker v. State Bd. of Registration for the Healing Arts, 404 S.W.2d 402, 405 (Mo. App. 1966). Discipline under such statutes is not penal in nature and does not constitute an imposition of punishment. Younge v. State Bd. of Registration for the Healing Arts, 451 S.W.2d 346, 349 (Mo. 1969).

16. The United States Supreme Court and Missouri courts have routinely held that licensing statutes confer no vested rights and that professional licensing is a privilege granted by the

state. See Lambert v. Yellowley, 272 U.S. 581 (1926) (there is no right to practice medicine which is not subordinate to the police power of the states); State ex rel. Equitable Life Assur. Society of the United States v. Vandiver, 121 S.W. 45 (Mo. 1909) (a license authorizing a person to practice a profession or to carry on a particular business is not a contract which vests a right, but merely a grant of a privilege); In re Lacy, 112 S.W.2d 594 (Mo. App. 1937) (admission to the Bar and a license to practice law does not confer any vested right to continue such practice and the right to continue in the practice is contingent upon remaining a fit and safe person to exercise the privilege); Barbieri v. Morris, 315 S.W.2d 711 (Mo. 1958) (the issuance by the State of Missouri of a license to operate a motor vehicle does not create any contractual or vested right; it amounts to no more than a personal privilege extended by the state to be exercised subject to the restrictions imposed on its use and is subject to suspension and revocation as the statutes may provide on any ground that would justify a refusal to issue the license in the first instance); Brennecka v. Dir. of Revenue, 855 S.W.2d 509 (Mo. App. W.D. 1993) (the granting of a license is considered a privilege and not a right and the applicable statute does not affect substantive rights and it can, therefore, be applied retrospectively).

17. Once a license is issued, whether it is deemed a privilege, right, or entitlement, its continued possession may become essential in the pursuit of a livelihood. Hill v. State Dept. of Public Health and Welfare, 503 S.W.2d 6, 10 (Mo. 1973). Thus, suspension or revocation of a license involves state action that adjudicates important interests of the licensee. Id. In such cases, the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. Id. However, while a licensee may be entitled to his or her day in court under due process principles, the legislature maintains the right, out of concern for public safety, to place restrictions upon certain employment, particularly in regards to convicted felons. Doe v. Phillips, 194 S.W.3d 833, 843 (Mo. 2006). While a licensee has an interest in his or her license to practice, so too does a licensing agency have a vital interest in safeguarding the public health and welfare. Larocca v. State Bd. of Registration for Healing Arts, 897 S.W.2d 37, 42 (Mo. App. ED. 1995). Protecting the public health and welfare is a primary purpose of professional licensing statutes. Lane v. State Comm. of Psychologists, 954 S.W.2d 23, 25 (Mo. App. E.D. 1997). See also Barbieri, Bittiker, Younge, and Boston, *supra*. A person who is statutorily deemed a menace or threat to the public is no less a menace or threat because some, if not all, of his convictions occurred before the effective date of a given statute. Barbieri at 714.

18. Retroactive applications of licensing statutes merely use a licensee's past conduct, such as prior convictions, as a basis for future decision-making by the state to determine whether the licensee's privileges should be disciplined. Phillips, 194 S.W.3d at 852.

19. A bail bond agent must apply biennially for renewal of a bail bond agent license. § 374.730, RSMo (Supp. 2006). A bail bond agent must demonstrate qualification for licensure each time the agent seeks renewal of his or her license. § 374.750, RSMo (2000). To the extent any rights or entitlements are carried with a license, those rights would not attach until the license was originally issued or renewed. Boston at 266, *supra*. Additionally, in the case of a license denial, the law at the time the application for licensure is submitted would control. *Id.* In the present case . . . the present version of § 374.755, effective January 1, 2005, [applies] despite the fact that any rights or entitlements Defendant may have had, attached when he was issued a bail bond agent license on March 17, 2005. . . .

20. The law in effect at the time Christian filed his application for bail bond agent license controls regarding his licensure qualification. The Director has established cause to discipline the bail bond agent license of Donald E. Christian pursuant to § 374.755.1(2), RSMo (Supp. 2005).

SO ORDERED on February 25, 2008.



JOHN J. KOPP
Commissioner